No. 04-1042

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
2005
OFFICE OF THE CLERK

NICK A. KOLEV, PH.D., P.E.,

Petitioner,

v.

TONYA M. PRESCOTT, ETC., AND
PRESCOTT & PRESCOTT LAW FIRM,

Respondents.

On Petition For Writ Of Certiorari
To The California Court Of Appeal
Fourth District, Division Three

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Although set forth as seven purported questions posed by petitioner, the issue raised appears to be:

> Was petitioner deprived of his rights because he represented himself in litigation against his former attorneys?

CORPORATE DISCLOSURE STATEMENT

Respondents are Tonya M. Prescott and Prescott & Prescott Law Firm. There are no parent corporations or publicly held companies owning 10% of Respondents' stock.

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INTRODUCTION

This legal malpractice action arose from respondents' representation of petitioner in a marital dissolution action, including its settlement through mediation.

After the trial court sustained respondents' demurrer to and motion to strike portions of the initial complaint with leave to amend, petitioner became convinced that there was a conspiracy afoot between respondents' counsel, his ex-wife's lawyer (Bruce Bridgman) and the trial court, which the Eastern European emigre then attributed to his assumptions that they were "Jews" and alumni of the same law school.[1]

Petitioner filed a first amended complaint in which he failed to allege any cognizable cause of action against his former attorneys. Petitioner then failed to file written opposition to respondents' demurrer to his first amended complaint. Petitioner waived oral argument after receiving the court's tentative ruling that it would grant the demurrer without leave to amend.

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[1] Petitioner theorized that respondents selected their defense counsel (then Hollins & Fields LLP) by virtue of the fact that there was an associate with the surname "Lewis" at an unrelated law firm ("Hollins & Schehter [sic]") who undoubtedly must be the son of the trial judge, Gregory H. Lewis. Petitioner's "BAR Buddies" conspiracy theory evolved into a claim that respondents, petitioner's ex-wife's lawyer, Bruce Bridgman, and a member of the Orange County DA's office, attorney Vickie Bridgman, exerted influence over the trial judge in his rulings in the instant malpractice case, and that noted jurist William F. Rylaarsdam (Justice of the California Courts of Appeal) eventually stepped into the mix to protect his "BAR Buddies" by affirming the orders of the trial court. (Petition, pp. 2-4, and exhibit 13, "Appendix Publish Request," p. 3.)

When petitioner withdrew his first amended complaint, the trial court dismissed his case. (Appendix, exhibits 5, "Notice of withdrawl [sic], memorandum of points and authorities," and 7, minute order.).

The bitterness and volatility of the underlying divorce case that spilled over into petitioner's relationship with his former counsel has now spilled into his efforts to resurrect his case through the California Courts of Appeal, the California Supreme Court, and now this Court. Petitioner's focus has shifted from his ex-spouse or ex-lawyer to the members of the California judiciary involved in deciding the legal malpractice case. As set forth more fully below, there was no misconduct, there is no constitutional question, and the petition should be summarily denied.

STATEMENT OF THE CASE

Petitioner's appendix reveals the following:

Petitioner commenced his legal malpractice lawsuit on May 13, 2002, and the case was assigned for all purposes to the Hon. Gregory H. Lewis, judge of the California Superior Court. (Plaintiff's exhibit 19, "Appendix Order Dismissal," p. 1.)

On December 16, 2002, the trial court commenced the hearing on respondents' demurrer to petitioner's original complaint, unaware that petitioner had filed a first amended complaint ten days earlier. ("Appendix Oral Argument," pp. 1 and 5.) Petitioner had also filed a motion to strike the demurrer, which the court denied ("Appendix

Oral Argument," p. 2), and mistakenly[2] filed a motion for leave to file the same first amended complaint, which the court took off calendar as moot ("Appendix Oral Argument," p. 6).

The court sustained the demurrer to the initial complaint, with twenty days leave to amend. ("Appendix Oral Argument," p. 2.) After respondents' counsel brought the existence of the first amended complaint to the court's attention, the court offered petitioner the option of filing a new complaint or proceeding on the first amended complaint filed on December 6, 2002:

> THE COURT: WELL, THE ORDER OF THE COURT, BASED UPON THE RULING, WAS THAT THE DEMURRER WAS SUSTAINED AND YOU HAD 20 DAYS LEAVE TO AMEND.
>
> NOW I DON'T KNOW IF YOU AMENDED PROPERLY OR NOT, BUT YOU HAVE FILED A FIRST AMENDED COMPLAINT, AND BY REASON OF THE COURT'S RULING – BY REASON OF THE COURT'S RULING THAT WILL BE DEEMED FILED. . . .
>
> [¶¶]
>
> THE COURT: YOU WISH TO CONTINUE WITH YOUR FIRST AMENDED COMPLAINT?
>
> MR. KOLEV: YES. (Petitioner's exhibit 3, "Appendix Oral Argument,"[3] pp. 6-7.)

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[2] California *Code of Civil Procedure* section 474 provides that, as a matter of right, so long as no answer is filed to the initial complaint, the plaintiff may file a first amended complaint without leave of court.

[3] The "transcript" (petitioner's exhibit 3) appears to have been highlighted and annotated by petitioner.

Additionally, during the course of the hearing, the trial court admonished petitioner on two points, with which petitioner later took issue in the California Court of Appeal and in the instant petition. Having been presented papers similar to those before this Court (and, as the appendix reveals, before the California Court of Appeal and California Supreme Court), the trial court recommended that petitioner find legal counsel:

> WE HAD SOME PROBLEMS WITH YOUR PAPERS. YOU ARE NOT A LICENSED LAWYER IS THAT CORRECT?
>
> MR. KOLEV: YES, YOUR HONOR, I AM JUST THE PLAINTIFF.
>
> THE COURT: WELL, JUST A PLAINTIFF, BUT IN THE MATTER OF AN ACTION FILED WITH THE SUPERIOR COURT, THE LIKE OF WHICH IS FILED NOW, YOU MUST ATTEND TO THE RULES WHICH ARE SET FORTH, AND THE RULES ARE SET FORTH IN [THE] CALIFORNIA RULES OF COURT, . . . AND MULTIPLE VOLUMES OF THE CODE.
>
> YOU HAVE THE RIGHT TO REPRESENT YOURSELF, MR. KOLEV, AND I WANT TO MAKE THAT VERY CLEAR. IT IS A CONSTITUTIONAL RIGHT TO REPRESENT YOURSELF, BUT IN THE LAW WE HAVE AN ADAGE, AND THE ADAGE IS THAT HE WHO REPRESENTS HIMSELF HAS A FOOL FOR A CLIENT.
>
> YOU ARE TOO EMOTIONALLY INVOLVED. YOU DON'T USUALLY KNOW WHAT THE STATUS IS OF THE LAW AND MOTION PRACTICES, PRESENTING EVIDENCE OR MAKING OBJECTIONS, IF COUNTERING

OBJECTIONS ARE MADE, SEATING A JURY AND HANDLING DISCOVERY. AND I SENSED WHEN READING YOUR PAPERS THAT YOU ARE A VERY, VERY BRIGHT MAN. NO QUESTION ABOUT IT THAT YOU ARE A VERY BRIGHT MAN, BUT YOU ARE SADLY FAILING WITH AN UNDERSTANDING OF HOW THE LAW WORKS AND THIS IS TO YOUR DETRIMENT, BUT WE CAN'T EXPECT EVERYBODY TO UNDERSTAND UNLESS YOU HAVE BEEN THROUGH LAW SCHOOL AND PRACTICED LAW, AND THEN WE CAN EXPECT YOU TO UNDERSTAND, BUT WE HAVE TO PLAY BY THE SAME RULES.

I CAN'T GIVE YOU ANY GREATER FAVOR BECAUSE YOU ARE WITHOUT A LAW DEGREE OR KNOWLEDGE ON HOW TO PROSECUTE A CASE. I CANNOT GIVE YOU ANY GREATER NOR LESSER. SAME WITH HER, I CAN'T GIVE HER ANYMORE THAN I CAN GIVE YOU, BUT I CAN'T HELP YOU.

YOUR PAPERS ARE SADLY REMISS IN FOLLOWING THE RULES OF COURT. THEY ARE SADLY REMISS IN NOT KNOWING WHAT YOU ARE DOING, AND YOU ARE GOING TO SUFFER AS A RESULT OF THAT.

ALL OF THAT IS SAID TO YOU SO YOU MIGHT ENGAGE THE SERVICES OF AN ATTORNEY TO ASSIST YOU IN THE PROSECUTION OF YOUR CASE. **IF YOU CHOOSE TO DO IT, FINE; IF YOU DON'T CHOOSE TO DO IT, FINE TOO. THAT'S YOUR OWN BUSINESS, BUT I'VE TOLD YOU AND YOU MIGHT WANT TO TAKE THOSE WORDS TO**

HEART. . . . [Emphasis added.] (Petitioner's exhibit 3, "Appendix Oral Argument," pp. 2-3.)

Respondents demurred to the first amended complaint. Petitioner filed no opposition. (Petitioner's exhibit 6, "Appendix Demurrer," p. 1.)

On January 17, 2003, petitioner filed a "case management statement" in which he asserted his belief that there was a "CONSPIRACY" against him and asked that the trial court recuse itself if "the prominence of [respondents] and of [attorneys] Mr. and Mrs. Bruce Bridgman's [firm]" presented a conflict of interest. (Petitioner's exhibit 4, "Appendix Peremptory Judge, pp. 1-2.)

On March 4, 2003, the trial court posted its tentative ruling on the internet that it would sustain respondents' demurrer without leave to amend and, on March 5, 2003, the tentative ruling became the order. (Petitioner's exhibit 6, "Appendix Demurrer," p. 1, Petitioner's exhibit 7, "Appendix Order to Dismiss," p. 1.)

On March 17, 2003, petitioner filed a "notice of [withdrawal]" of his first amended complaint, asserting that he needed more time to prepare his case for trial. (Petitioner's exhibit 5, "Appendix Trial Objection," pp. 1-2.) The court ordered the case dismissed on March 17, 2003. (Petitioner's exhibit 7, "Appendix Order to Dismiss," p. 1.)

On March 27, 2003, respondents submitted an order of dismissal, which was executed, filed and entered on April 1, 2003. (Petitioner's exhibits 19, "Appendix Order Dismissal," pp. 1-2, and 8, "Appendix Peremptory Challenge," p. 1.)

On April 18, 2003, petitioner filed a "peremptory challenge" and a motion to challenge for cause, seeking the recusal of the trial judge, purportedly pursuant to

California *Code of Civil Procedure* sections 170.6 and 170.1, respectively. (Petitioner's exhibit 8, "Appendix Peremptory Challenge," p. 1.) The case had been dismissed over two weeks earlier; the trial court found it no longer had jurisdiction over the matter. (Petitioner's exhibit 8, "Appendix Peremptory Challenge," p. 1.)

On May 9, 2003, petitioner filed a motion for new trial; on May 13, 2003, the trial court found it lacked jurisdiction. (Petitioner's exhibit 9, "Appendix Oral Argument," p. 1.)

Petitioner appealed from the orders dismissing the action and denying his motions to disqualify the trial court. (Petitioner's exhibit 11, "Appendix Opinion W. Rylaarsdam," p. 2.) On June 9, 2004, the California Court of Appeal, Fourth Appellate District, Division 3, issued its unpublished opinion affirming the judgment and post-judgment orders. (Petitioner's exhibit 11, "Appendix Opinion W. Rylaarsdam," pp. 1, 2.)

With regard to petitioner's efforts to disqualify the trial court, the Court of Appeal found that the peremptory challenge and motion to recuse, filed after the April 1, 2003, order dismissing the case, were untimely. As for the request that the court decide whether there was a conflict of interest in the aforementioned "case management statement," the Court of Appeal found that petitioner did not properly raise the issue because petitioner failed to "describe any sort of relationship between the judge and the Bridgmans, much less one that would require the judge to recuse himself."

With regard to the order sustaining respondents' unopposed demurrer to the first amended complaint without leave to amend, the Court of Appeal found no

abuse of discretion because petitioner had failed to plead – or show that he could plead – the elements of his various claims:

- Petitioner failed to plead any cause of action for fraud and deceit. Under *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1332, petitioner's "failure to specifically plead facts supporting each element of his fraud and deceit causes of action precludes recovery on those claims." (Petitioner's exhibit 11, "Appendix Opinion W. Rylaarsdam," pp. 4-5.)

- Petitioner's cause of action for professional malpractice arose from a marital dissolution in which the parties entered into a settlement agreement. Under *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518-1519, and *Orrick Herrington & Sutcliff v. Superior Court* (2003) 107 Cal.App.4th 1052, petitioner failed to carry his burden to plead facts to show that "his ex-wife would have settled for less than she did, or that following trial, a judge would have entered judgment more favorable than that to which he stipulated." (Petitioner's exhibit 11, "Appendix Opinion W. Rylaarsdam," pp. 5-6.)

- As for the remaining claim, "[n]one of plaintiff's allegations in regard to [respondents'] representation of him during the dissolution proceeding [or thereafter] rise to the level of outrageous conduct" upon which a claim for intentional infliction of emotional distress must be based under *Cervantes v. J.C. Penney Co.* (1979) 24 Cal.3d 579. (Petitioner's exhibit 11, "Appendix Opinion W. Rylaarsdam," p. 6.)

Petitioner next sought publication of the Court of Appeal's decision. (Petitioner's exhibit 13, "Appendix Publish Request," pp. 1-10.)

On August 25, 2004, the California Supreme Court denied petitioner's petition for review. (Petitioner's exhibit 14, "Appendix SC Denied Review," p. 1.)

On January 19, 2005, petitioner modified and resubmitted the instant petition for writ of certiorari, which he originally submitted on November 23, 2004. Despite his modifications, petitioner's own record shows that there is no basis for the United States Supreme Court to invite briefing on the merits of the petition, exercise jurisdiction and grant a writ of certiorari over the California Courts of Appeal.

ARGUMENT

PETITIONER HAS FAILED TO DEMONSTRATE THAT THE UNITED STATES SUPREME COURT SHOULD EXERCISE JURISDICTION

Review on a writ of certiorari is not a matter of right but of judicial discretion and may be granted only for compelling reasons. (US Supreme Court rule 10.)

The thrust of this petition is that petitioner was deprived of his rights because he represented himself in litigation against his former attorneys. However, as set forth above, the record reveals that the trial court painstakingly warned petitioner of the perils and pitfalls of self-representation. The trial court warned petitioner of the likely ramifications for one unschooled in legal procedure and the law, as well as the emotional stakes for anyone who elects to represent him or herself. The California Court of Appeal found that petitioner's suspicions of misconduct by way of some "conflict" of interest had no

merit nor was there any abuse of discretion by the trial court's dismissal of petitioner's case.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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